NO. 80-810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HECTOR GARCIA,

Petitioner,

versus

ALTON V. M. GLOOR, W. H. HAUBOLDT, JR., WILBURN F. GLOOR AND GLOOR LUMBER & SUPPLY, INC.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES A. HERRMANN
TEXAS RURAL LEGAL AID, INC.
305 E. Jackson, Suite 206
Harlingen Texas 78550
(512) 423-3111
January 9, 1981

Attorneys for Petitioner

TABLE OF CONTENTS

Citations.....i
Petitioners Reply.....1
Certificate of Service.....10
Appendix A.....1A
Appendix B.....1B

CITATIONS

Cases:

Baldomero Casas v. Brittons Photo Supply Co., B-78-202 (S. D. Tex. 1978). . . .1

Dothard Rawlinson, 433 U.S. 321, 331-332. .7

EEOC v. Dairy Queen, Inc., CA-C-79-48 (S. D. Tex. 8/21/79). . . 1

Griggs v. Duke Power Co., 401 U.S. 792 (1973). 3

Lau v. Nichols, 414 U.S. 563 (1974). . . 4

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). 4

Regulations:

45 Federal Register No. 250 pp. 85632-85637 (12/29/80). 2

Petitioner hereby submits his reply to the Opposition of Respondents to the Petition for Writ of Certiorari:

1. At p.16 of their Opposition the Respondents state that the cases Petitioner has cited of pending cases involving language discrimination are inapposite. This is incorrect. An additional case has been discovered since the Petition for Writ of Certiorari was filed. EEOC v. Dairy Queen Inc.,CA-C-79-48 (S.D. Tex. 8-21-79). It is Petitioner's understanding that the suit involves a Mexican-American employee in a fast food operation who resigned when he was told tht he would be required to speak English only. The person is fluent in English but was told that he would be prohibited from using Spanish. This case has been held in abeyance pending final disposition of this appeal. The case of Baldomero Casas v. Brittons Photo Supply Co., B-78-202 S.D. Tex. 1978) cited on p.18 of the Petition also involves a bilingual Mexican-American salesman who resigned when told that he would be required to speak English only. The Resendez case involved a bilingual Mexican-American employee who was discharged for speaking Spanish in violation of a speak English only rule.

2. In addition the EEOC has finalized its proposed guidelines on a national origin discrimination which are reprinted as proposed guidelines in Appendix E of the Petition for Writ of Certiorari. See 45 Fed. Reg. No. 250 pp.85632-85637 (12-29-80). See also Appendix B herein for the pertinent new guidelines on speak English-only-rules.

3. The Respondent states at Page 2 that Petitioner:

> "has an easy command of the terms and usage of the English language, uses good grammar and syntax, and has no difficulties in being understood when speaking in English."

Nowhere in the record does any court hold this and in fact the Respondent's attorney stated that Petitioner was not very proficient in the English language. Appendix 2A.

The Respondents argue that being fired for speaking ones' national origin language is not a curb on cultural expression or a hardship if one is able to speak both languages but Respondents admit that language is a national origin characteristic. The Respondent's analysis begins and ends with this assumption. Petitioner testified that it was hard for him to comply with the rule and that he always slipped. Appendix

1-2A. Professor Chavira testified that the rule would be hard to deal with and even the District Court stated that the rule was arbitrary.

Respondents also state that the Court made it clear that it was not considering a situation where an employee "inadvertently slips" into a more familiar tongue or did not have the ability to speak English or in which the rule might impose a hardship on the employees. Even ALTON V. W. GLOOR, the Defendant who discharged the Petitioner, testified that he did not think that the Petitioner was intentionally violating the English-only-rule on the occasion giving rise to the Petitioner's discharge. Appendix 2-3A.

The Respondents persist in refusing to apply applicable legal analysis to this case. Respondents argue that language is a condition like pregnancy, i.e., pregnancy is voluntarily undertaken and absent a showing that refusal to accommodate the voluntary condition is a pretext for discrimination against women there is no duty on the part of the employer to accommodate. Res. Brief pp.8-9. Under Griggs v. Duke Power Co., 401 U.S. 792 (1973), this should be the end of the analysis and not the

beginning. It requires the pregnant employee to disprove the employer's business pretext before the employer is required to show that he did not discriminate. While pregnancy and even the habit of smoking are often voluntarily undertaken and even desired conditions, the Spanish language for many Mexican-Americans, like the Petitioner, is something that is given to them without their being asked. It is also a condition about which many Mexican-Americans are proud as are other language minorities about their national origin language. As Professor Chavira stated, language is a badge of ethnic or national origin identity that is prized by many and without which those national origin minority persons which have lost the language are at a distinct social and perhaps economic disadvantage as are Mexican-Americans who are unable to speak English. Language does not have to be a "deficiency" to be a protected characteristic.

Respondents cite Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) at page 8 of their brief for the proposition that Griggs and Lau v. Nichols, 414 U.S. 563 (1974) provide a sharp contrast to cases such as this one where an employer's refusal to

accommodate employee preference has formed the basis for discrimination charges. This is incorrect.

In Satty, the Court, while stating that the seniority policy appeared to be neutral in its treatment of male and female employees, found the policy to be discriminatory when unjustified by business necessity. The Court was very careful to follow the steps of Griggs and did not leap first to a determination of whether or not the plaintiff had dispelled any theoretical pretextual defenses which the defendant might have. The Court considered first whether there was discriminatory impact on women who became pregnant. Satty, supra. at p.140. If we compare the seniority rule in Satty to the Respondent's language rule in this case the English-only-rule could appear to be neutral in that it requires compliance by both Mexican-American and Anglo-American employees. But just as in Satty where the policy only affected pregnant females, the policy here only affects Spanish speaking Mexican-Americans.

Also, just as the employer in Satty apparently argued that the employee was not injured or harmed by the seniority rule, the Respondent in this case argues that the

Petitioner was not harmed in terms of Title VII. But, Petitioner was denied specific employment opportunities because he used Spanish in violation of the employer's rule, i.e., employment itself. Even if he had not been discharged for using Spanish but had been reprimanded and banished to the lumber yard as a laborer, the policy would have adversely affected him because of his use of Spanish. No Anglo-American had a chance at this sort of downgrading. As the Court stated in Satty:

> Here by comparison, Petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics... But that holding does not allow us to read §703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role. Satty, supra. at 142.

Like the women in Satty, the Mexican-American employees here are treated differently because of their role as bilingual employees in spite of the fact that the employer must have bilingual employees.

After the Court in Satty determined that the facially neutral seniority policy

was discriminatory, the Court took the next appropriate step in the analysis. The Court states:

> Recognition that Petitioner's facially neutral senority system does deprive women of employment opportunities because of their sex does not end the inquiry under §703(a)(2) of Title VII. If a company's business necessitates the adoption of particular leave policies Title VII does not prohibit the company from applying these policies to all leaves of absence including pregnancy leaves Title VII is not violated even though policies may burden female employees. Griggs, supra. at 431; Dothard v. Rawlinson, 433 U.S. 321, 331-332. But we agreed with the District Court in this case that since there was no proof of any business necessity adduced with respect to the policies in question, that Court was entitled to "assume no justification exists". Satty, supra at 143.

This is the correct analytical procedure. There must be a determination first of whether or not there is disparate treatment or disparate impact, i.e., discrimination, before there is any discussion of whether or not the employer has to accommodate or ignore a particular trait or characteristic.

The Respondents and the panel of the Fifth Circuit leaped over the first level of Griggs and focused initially on Petitioner's assumed preference for Spanish.

But the Petitioner was not discharged because of his preference or because his primary language was either Spanish or English. He was discharged because he broke the rule against speaking English only. Whatever the Petitioner's day to day preference, the burden is still on the employer to show that his rule is justified. Just as it would make no difference whether a black employee enjoyed being black or despised the fact of being black, an employer would still be required to justify a rule which placed employment restrictions on black employees.

If this Court is of the opinion that an English-only-rule which results in the discharge of a Mexican-American Spanish speaker for violation of the rule is not an injury cognizable under Title VII then there is no need to go further. If this Court is of the opinion that there is potential for unlawful discrimination in such a rule then the Court should advance to analyze whether or not the employer proved a business necessity for the rule. Petitioner proved more than that he has a preference for speaking Spanish, if indeed a preference it can be called. Even if we deem it a facially neutral rule, Petitioner

proved that the English-only-rule impacts only on Mexican-American employees, the Petitioner's preference not withstanding.

Many traits or characteristics are voluntary and preferential to the individual such as religion or the decision to bear children. Employment criteria influenced by national origin characteristics which affect job opportunities may obviously be in violation of Title VII or may appear to be neutral even though questionable such as a job criteria based on language. "Refusal to accommodate employee preferences which have been influenced by national origin" is Respondent's syllogism for "discharging a Mexican-American employee for speaking Spanish is not national origin discrimination because the rule is not discriminatory and language is not a protected characteristic and even if it is Respondent has a valid business reason for the rule." Petitioner submits that this position cannot be maintained under appropriate analysis.

Respectfully submitted,

TEXAS RURAL LEGAL AID, INC.
305 E. Jackson, Suite 206
Harlingen, Texas 78550
(512) 423-3111

James A. Herrmann

JAMES A. HERRMANN
Attorney of Record

CERTIFICATE OF SERVICE

I hereby certify that on this the 12th day of January 1981, I have mailed three true and correct copies of the foregoing Reply to Counsel of Record Neil Norquest, Ewers,Toothaker, Ewers, Abbott, Talbot, Hamilton & Jarvis, P. O. Box 3670, McAllen, Texas 78501, Certified Mail No.: 0930657 Return Receipt Requested; Mr. Jerry Nugent, 221 Sixth Street, Austin, Texas 78701, Certified Mail No.: 0930658 Return Receipt Requested; Mr. William H. Ng, EEOC, 2401 E. St., N. W. Washington D. C. Certified Mail No.: 0930659 Return Receipt Requested; Ms. Edna E. Canino, LULAC, 12631 S.W. 10th Terrace, Miami, Florida 33184, Certified Mail No.: 0930661 Return Receipt Requested; Mr. Joel G. Contreras, 800 Capital Mall, Sacramento, California Certified Mail No.: 0930660 Return Receipt Requested, by depositing said copies in the U. S. Mail at Harlingen, Texas 78550.

James A. Herrmann

JAMES A. HERRMANN

EXCERPTS FROM RECORD OF
PROCEEDINGS IN DISTRICT COURT

[43] QUESTION: In terms of your own ability to comply with the rule, was it difficult for you?

[43] THE WITNESS HECTOR GARCIA: Yes, sir, because in order to speak English, I have to think before what I am going to say.

[43] QUESTION: Did you feel like you had to be on your toes to avoid being caught?

[43] ANSWER HECTOR GARCIA: I had to be on my toes in order not to be caught, and I had to be on my toes whenever I was speaking English, whenever, I speak English, since I can give the wrong impression at times, because I cannot express myself fluently at times.

[44] QUESTION: Do you think you could realistically follow a rule like the one that--at Gloor Lumber Company against speaking Spanish?

[44] ANSWER HECTOR GARCIA: It is a very hard rule.

[45] QUESTION: Why do you say it is a hard rule?

[45] ANSWER HECTOR GARCIA: Because I tend to fall to speaking Spanish. That is why it is a hard rule to have.

[154] QUESTION BY DEFENSE COUNSEL: OK. This hypothetical man that Mr. Herrmann is telling you about is the Plaintiff in this lawsuit, Mr. Hector Garcia. He is a young man that went to the 10th grade in high school, had 6 or 7 jobs within a period of 18 months before he went to work for the Gloor Lumber Company, these people right here.

[154] DEFENDANT ANSWER DEFENDANT GLOOR: uh huh.

[154] QUESTION DEFENSE COUNSEL: , And admittedly he was not very proficient in the English language.

[206] QUESTION: Did he (Hector Garcia) appear at the same time to be intentionally

violating your rule (English-only) in your presence?

[206] ANSWER DEFENDANT GLOOR: No, sir, not necessarily, no.

APPENDIX B

This section recognizes that an individual's primary language is often an essential national origin characteristic. According to estimates from the Survey of Income and Education conducted by the U.S. Bureau of Census in Spring 1976, approximately 28 million persons in the United States (about 13% of the total U.S. population) have non-English language backgrounds and may be affected by an employer's speak-English-only rule. The survey identifies persons with non-English language backgrounds as persons whose mother tongue is not English, who normally use languages other than English, or who live in households where languages other than English are spoken. About 21 million, or seventy five percent, of this group are above the age of 18. The study shows the following approximate numbers for each of these language backgrounds: Spanish, 10.6 million; Italian, 2.9 million; German, 2.7 million; French, 1.9 million; Chinese, Japanese, Korean and Vietnamese, 1.8 million; Polish, 1.5 million. Approximately 2.4 million persons in the United States do not speak any English at all.*

An employer's rule which requires employees to speak English at all times, including during their work breaks and lunch time, is one example of an employment practice which discriminates against persons whose primary language is not English.

---

* See U.S. Department of Health, Education and Welfare, National Center for Education Statistics, Bulletin 78 B-5, August 22, 1978, "Geographic Distribution, Nativity, and Age Distribution of Language Minorities in the United States: Spring 1976"; Waggoner, Dorothy, "Non-English Language Background Persons: Three U.S. Surveys", TESOL Quarterly, vol. 12, No. 3 at 247–262, September, 1978.